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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No. 71-335

JOHN BYRON WOLBERG,

Petitioner,

v

STATE OF OREGON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No.----------

JOHN BYRON WOLBERG,

Petitioner,

v

STATE OF OREGON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

The petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals of the State of Oregon entered in this case on April 1, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon, officially reported at 92 Adv. Sh. 621 (1971), is appended to this petition as "Appendix A."

The decision of the Court of Appeals of the State of Oregon, denying a petition for rehearing, officially

reported at 92 Adv. Sh. 9, p. [3], is appended to this petition as "Appendix B."

The decision of the Supreme Court of the State of Oregon, declining to review the opinion of the Court of Appeals, officially reported at 92 Adv. Sh. 13 [4], is appended to this petition as "Appendix C."

The judgment of the Court of Appeals of the State of Oregon is appended to this petition as Exhibit D."

JURISDICTION

The Court of Appeals of the State of Oregon rendered a decision an opinion in this cause on April 1, 1971. A "Petition for Rehearing" was filed on April 20, 1971, and denied by the Court of Appeals on April 27, 1971. On May 24, 1971 a "Petition for Review of Decision of Court of Appeals" was filed with the Supreme Court of the State of Oregon. On June 9, 1971, the Supreme Court of the State of Oregon denied the Petition for Review. On June 10, 1971, the Court of Appeals of the State of Oregon issued its mandate.

The "Petition for Rehearing" was timely filed in the Court of Appeals, and the Petition for Review of Decision of Court of Appeals" was timely filed in the Supreme Court of the State of Oregon.[1]

---

[1] Oregon Revised Statutes 2.520. Procedure for review of decisions of Court of Appeals; scope of review.

(1) Any party aggrieved by a final judgment of the Court of Appeals may petition the Supreme Court for

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(3).

QUESTION PRESENTED

Where a person convicted of a criminal offense suffers from treatable schizophrenia of the chronic undifferentiated type, is it cruel and inhuman treatment within the proscription of the Eighth and Fourteenth Amendments to the Constitution of the United States to sentence the defendant to confinement in the state penitentiary where, as the State concedes, there are no facilities for treatment of the mental disease.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Eighth Amendment:

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review within 30 days after the date the judgment becomes final, by filing with the clerk and serving on the adverse party or parties a notice stating that he petitions the Supreme Court for review of the final judgment of the Court of Appeals. The petition shall be allowed whenever three or more judges of the Supreme Court vote to allow it.

(2) Before petitioning the Supreme Court for review of a final judgment of the Court of Appeals, the party requesting the review shall file a timely petition for rehearing with the Court of Appeals. The petition for rehearing shall point out the errors claimed by the petitioner to have been committed by the Court of Appeals and must be filed within 20 days after the date of the decision or within such extension of time as the court may allow. Notwithstanding a petitioner's failure to comply with the requirements of this subsection, the Supreme Court may review a final judgment of the Court of Appeals upon a showing of good cause.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punshment inflicted."

United States Constitution, Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statutes 163.250. "*Assault with dangerous weapon.* Any person, who is armed with a dangerous weapon and assaults another with such weapon, shall be punished upon conviction by imprisonment in the penitentiary for not more than 10 years, or by imprisonment in the county jail not less than one month nor more than one year, or by a fine of not less than $100 nor more than $1,000."

STATEMENT OF THE CASE

The petitioner, who is not legally insane within the standards imposed by the M'Naghten test which applies in Oregon, pleaded guilty to a district attorney's information charging him with the offense of assault with a dangerous weapon. Oregon Revised Statutes 163.250. The petitioner was sentenced to

the legal and physical custody of the Corrections Division of the State of Oregon for a term not to exceed 10 years, the maximum sentence permitted under the Statute. The petitioner appealed upon the ground that the sentence was, under the circumstances, cruel and unusual punishment within the Eighth and Fourteenth Amendments to the Constitution of the United States.

The petitioner suffers from schizophrenia of the chronic undifferentiated type (Tr. 22, 34). He was a business associate of William D. Brown a contractor (Tr. 4). Brown's wife worked in this business, and the petitioner knew her. The Browns had and unhappy family relationship and on occasion Brown struck his wife, a fact of which the petitioner was aware (Tr. 13, 14). On January 15, 1970, the petitioner and a hired criminal partner lured Brown to a point on the Oregon coast where the two men assaulted, beat and fired a weapon at Brown, who, however, successfully eluded them (Tr. 4-12).

On July 31, 1970, after the petitioner had pleaded guilty but before sentence was pronounced, the Circuit Court of the State of Oregon for Lincoln County conducted a hearing in mitigation and sentencing in the petitioner's case (Tr. 1, 2). Two psychiatrists, Dr. Henry Dixon, Jr. and Dr. Ivor Campbell, testifield at the hearing on mitigation of sentence. Both agreed that the petitioner was afflicted with schizophrenia (Tr. 22, 34). The petitioner is not a "sociopathic personality," but suffers from a true mental illness. Dr. Campbell testified:

> "I have examined many people who have been charged with assault with a dangerous weapon and it is my feeling that it's only a minority of them who are suffering from a mental illness of this nature, psychotic mental illness. I think the others mostly could be considered sociopaths or psychopaths and they could carry this out without any care for the consequences or with the idea that they can get away with what they are doing. This is strictly a criminal thing, and I don't think—I think this man is mentally ill, his actions were criminal but I don't think his thinking was criminal, he was ill and sick." (Tr. 44)).

According to the undisputed testimony of both psychiatrists, the petitioner's mental disease cannot be treated at the Oregon State Penitentiary where he will be confined. Dr. Campbell testified:

> "They are incapable of treating his problem. In regards to handling, I think in handling they will reduce him to medications and to subservience and there would be no treatment of his condition." (Tr. 37).

In its respondent's brief before the Court of Appeals of the State of Oregon, the Attorney General agreed with all of the foregoing facts, including the fact that the State's facilities are inadequate for treatment of the petitioner's condition.

The physicians agreed that the petitioner's disease can be treated, although they differed on the preferable course of treatment. Dr. Dixon, who was petitioner's treating physician, believed that " * * * long

term outpatient care with the option of inpatient care from a medical standpoint is the most advised medical treatment for Mr. Wolberg" (Tr. 26). Dr. Campbell thought that " * * * for the benefit of all concerned that a period of hospitalization would be indicated to be followed by outpatient care." (Tr. 36). Dr. Campbell expressed the opinion that hospitalization should be followed " * * * for some considerable time in outpatient care" (Tr. 38).

The constitutional issues were not articulated in the court of first instance. In his "Appellant's Brief" filed in the Court of Appeals of the State of Oregon the "Question Presented was stated as follows:

> "Is the sentence imposed upon defendant cruel and unusual and not proportionate to the offense in violation of Article I, Section 16 of the Constitution of Oregon, and Amendments VIII and XIV of the Constitution of the United States?" (App. Br., p. 2).

The appellant's brief continued with the following statement under the heading "Point and Authorities":

> "The sentence to confinement imposed in this case was cruel and unusual and not proportionate to the offense in violation of Article I, Section 16 of the Oregon Constitution and Amendments VIII and XIV of the Constitution of the United States. [citing cases]" (App. Br., p. 4).

Under the heading "Argument," appellant's brief contained the following statements:

> "Mr. Wolberg has appealed that sentence as-

serting that its imposition in this case is cruel and unusual and not proportionate to the offense in violation of Article I, Section 16 of the Oregon Constitution and Amendments VIII and XIV of of the Constitution of the United States. Appellate courts of both the federal government and the State of Oregon have held that even though a sentence is imposed within the statutory maximum, it may nevertheless be so disproportionate to the offense as to fall within the constitutional inhibition against cruel and inhuman punishment. [citing cases]. Likewise, appellate courts have held that what constitutes 'cruel and unusual punishment' is to be considered in the light of developing civilization and not in the light of what might have been considered cruel an inhuman punishment in earlier years. [citing cases] So it has been held that a cruel or unusual punishment can be inflicted not only by an unconscionable penalty imposed by statute, but also by an inhumane execution of a permissible penalty imposed under a constitutionally permissible statute. [citing cases]

"It has been held that facts and circumstances and attitudes of the inmate are relevant factors for consideration in determining whether punishment constitutes cruel and unusual punishment, *Wright* v. *McMann*, 257 F. Supp. 739 (D.C., NY, 1966), and that the circumstances of the confinement itself were characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people can cause punishment to be 'cruel and unusual punishment.' *Holt* v. *Sarver*, 300 F. Supp. 825 (D.C., Ark., 1969); 309 F. Supp 362 (D.C., Ark., 1970)." (App. Br. pp. 5, 6)

The foregoing quotations from the "Argument" of the appellant's brief were followed by a lengthy discussion of the petitioner's mental disease and the inadequacy of the State prison facilities to treat this disease (App. Br. 8-9).

The decision of the Court of Appeals of the State of Oregon contains the following statements:

> "The trial court sentenced the defendant to 10 years' imprisonment, and this appeal was from that sentence upon the ground that it is cruel and unusual punishment.
>
> "This claim is based upon psychiatric opinions indicating that the defendant is schizophrenic and that there are no facilities available in the state prison system for the treatment of his condition.
>
> "A review of the record indicates that the defendant does indeed suffer from a mental disorder. It also discloses that he engaged in bizarre attempts, almost successfuly, to kill his business partner, and that he is capable of going to great lengths to accomplish such a result. This comes within the rule of State v. Van Kleeck, 248 Or 7, 432 P2d 173 (1967).
>
> "The sentence which the trial court imposed was within the limitations of law and we cannot conclude that the trial court was wrong in its assessment thereof." (Appendix A, infra, p. 13)

State v. *Van Kleeck*, 248 Or. 7, 432 P.2d 173 (1967), holds that a sentence of 25 years in the penitentiary imposed as a result of criminal acts which were products of a mental illness, was proper as

against the defendant's claim on appeal ". . . that the sentence was invalid because it was in violation of the state and federal constitutional provisions prohibiting cruel and unusual punishment and the equal protection clause of the Fourteenth Amendment," and as against the defendant's contention on appeal that the sentence ". . . was in violation of the Eighth Amendment to the Federal Constitution (prohibiting cruel and unusual punishment) because the sentence was imposed as punishment for an illness." (248 Or. at p. 7).

Accordingly, it would appear that the Court of Appeals of the State of Oregon considered the petitioner's constitutional claims to be timely, and that it considered and rejected those claims.

REASONS FOR GRANTING THE WRIT

The petitioner suffers from schizophrenia, a mental illness that is capable of treatment. The Oregon State Penitentiary, where the petitioner will be confined under the court's sentence, has no facilities for treating this disablity, as the Attorney General of the State of Oregon candidly admits. One of the physicians called as a witness testified that treatment at the State penitentiary would consist of drugging the petitioner into a condition of "subservience" (Tr. 37).

Although there is a surprising lack of authorities which consider the issue, we believe that twentieth century views of criminal justice forbid the sentencing of a physically or mentally diseased defendant

to confinement in an institution where no facilities exist for treatment of his illness. The issue is, briefly stated, whether it is cruel and unusual punishment to sentence a mentally diseased defendant to confinement where no facilities exist for treatment. The federal question is one of importance, and has not been decided by this Court.

In *Jones* v. *Wittenberg*, 323 F. Supp. 93 (N.D., Ohio, 1971), the United States District Court held, in a suit under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, that detention of persons "who either are or may be confined" to the county jail of Lucas County, Ohio, constituted cruel and unusual punishment where the facilities were grossly substandard and, among other things the following condition existed:

> "Health facilities are primitive. A nurse is on duty in the day time, who supervises the prisoners' medication. There is a jail physician who comes two or three afternoons a week, and is on call at other times, but often cannot be reached. * * * There is no infirmary for prisoners who are ill, and only two small offices or examining rooms, with little or no equipment, for use by a nurse, a doctor and dentist. If a prisoner is ill enough, he may be removed to one of the local hospitals." (323 F. Supp. at 97).

Although, in the past, the federal courts have been reluctant to interfere with prison management even though brutal treatment and violation of constitutional guarantees are alleged, see e.g., *United States ex rel Atterbury* v. *Ragen*, 237 F.2d 953 (C.A.

7, 1956); *Cole* v. *Smith*, 344 F.2d 721 (C.A. 8, 1965), the current of authority is now the other way. *Jackson* v. *Bishop*, 404 F.2d 571 (C.A. 8, 1968); *Wright* v. *McMann*, 387 F.2d 519 (C.A. 2, 1967); *Howard* v. *Smyth*, 365 F.2d 428 (C.A. 4, 1966); *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D., Ark., 1970).

The issue is not, as in *Powell* v. *Texas*, 392 U.S. 514 (1968) and *Robinson* v. *California*, 370 U.S. 660 (1962), whether the petitioner may validly be convicted and confined because of his schizophrenic condition. Assuming that confinement is proper, the issue is whether he may be sentenced to an institution where, as all concede, no facilities exist for treatment of the illness. The issue would be even clearer if, instead of a mental disease, the petitioner were suffering from a serious physical disability which the state penal institutions have no facilities to treat.

CONCLUSION

For the reasons set forth in this Petition, the Court should accept certiorari to determine whether a state may, consistent with due process, confine a person suffering from mental disease in an instiution which has no facilities for treatment of the disease.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Department 2.

STATE OF OREGON, *Respondent* v.
JOHN BYRON WOLBERG, *Appellant.*

Appeal from Circuit Court, Lincoln County.

COURTNEY R. JOHNS, Judge

Argued and submitted March 17, 1971.

Brian L. Welch, Portland, argued the cause for appellant. With him on the brief were Pozzi, Wilson & Atchison, Portland.

Jacob B. Tanzer, Solicitor General, Salem, argued the cause for respondent. With him on the brief was Lee Johnson, Attorney General, Salem.

Before SCHWAB, Chief Judge, and LANGTRY and FORT, Judges.

AFFIRMED.

PER CURIAM

The original indictment against the defendant was for assault with intent to kill. He pleaded guilty to a reduced charge, by information, of assault with a dangerous weapon. ORS 163.250. The trial court sentenced the defendant to 10 years' imprisonment, and this appeal is from that sentence upon the ground that it is cruel and unusual punishment.

This claim is based upon psychiatric opinions indicating that the defendant is schizophrenic and that there are no facilities available in the state prison system for the treatment of his condition.

Our review of the record indicates that the defendant does indeed suffer from a mental disorder. It also discloses that he engaged in bizarre attempts, almost successfully, to kill his business partner, and that he is capable of going to great lengths to accomplish such a result. This case comes within the rule of *State* v. *Van Kleeck*, 248 Or 7, 432 P2d 173 (1967).

The sentence which the trial court imposed was within the limitations of law and we cannot conclude that the trial court was wrong in its assessment thereof.[1]

Affirmed.

[1] See ORS 179.473 and 179.476.

APPENDIX B

COURT OF APPEALS
April 27, 1971
State v. John Bryon [sic] Wolberg, appellant's petition for rehearing denied.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OREGON

PETITIONS FOR REVIEW

Petitions Denied
June 9, 1971

State v. John Byron Wolberg, 92 Adv. Sh. 621.

APPENDIX D

STATE OF OREGON, *Plaintiff-Respondent*	)	No. 30160
v.	)	ORDER ENTERING MANDATE
JOHN BYRON WOLBERG, *Defendant-Appellant*	)	

This matter coming on this 23rd day of June, 1971, the State of Oregon appearing by and through Charles P. Littlehales, District Attorney, the plaintiff above-named moves the Court for entry in the proper records of this court of the mandate of the Court of Appeals of the State of Oregon did heretofore on the 17th day of March, 1971, duly and regularly make and enter a certain mandate and judgment in appeal of the above-entitled cause, wherein said John Byron Wolberg was appellant and said State of Oregon was the respondent, which said judg ment and mandate, as appears from the copy thereof duly certified to by Edward Branchfield, Clerk of the Supreme Court of the State of Oregon, on the 10th day of June, 1971, and hereby referred to and made a part hereof, was and is in words and figures as follows, to-wit:

BE IT REMEMBERED that in the COURT OF APPEALS of the State of Oregon, in the city of Salem, on this THURSDAY, the 1st day of APRIL, 1971, the following proceedings were had:

STATE OF OREGON, *Respondent*	)	No. 30160
v.	)	Appeal from
JOHN BYRON WOLBERG, *Appellant*	)	LINCOLN COUNTY

This cause on March 17, 1971, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

IT FURTHER IS ORDERED that respondent have and recover of and from appellant its costs and disbursements in this court taxed at $15.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

STATE OF OREGON,)
County of Marion,) ss.

I, Edward Branchfield, Clerk of the Court of Appeals of the State of Oregon, do hereby certify that the foregoing copy of judgment has been by me compared with the original journal entry and that it is a correct transcript therefrom, and of the whole of

such original, as the same appears of record, and in my office and custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Salem, Oregon, June 10, 1971.

Edward Branchfield,
Clerk of Court of Appeals, State of Oregon

TO THE CIRCUIT COURT
OF THE STATE OF OREGON,
For the County of Lincoln

You are hereby commanded that of the above judgment order of our Court of Appeals you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Court of Appeals, and to law and justice shall appertain.

In Witness Whereof, I have set my hand and affixed the seal of said Court at Salem, Oregon, June 10, 1971.

Edward Branchfield,
Clerk of Court of Appeals, State of Oregon

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that said mandate and judgment heretofore made and entered by the Court of Appeals of the State of Oregon on the 17th day of March, 1971, upon the appeal to that Court from this Court of the above-entitled cause, is duly made and entered

of record in the proper journals and records of this Court.

IT IS FURTHER ORDERED that the Sheriff of Lincoln County, Oregon, forthwith deliver to the Division of Corrections at Salem, Oregon, the said John Byron Wolberg, defendant-appellant, and that he be there imprisoned during the term of the sentence heretofore imposed by this Court by said order of the 31st day of July, 1970, to-wit: for a period without limitation as to time not to exceed ten years.

Dated this 23rd day of June, 1971.

s/ Courtney R. Johns, Judge

STATE OF OREGON,)
County of Lincoln,) ss.

I, Alberta M. Bryant, County Clerk and ex-officio Clerk of the Circuit Court and of the County and State aforesaid, do hereby certify that the foregoing copy of Order Entering Mandate dated June 23, 1971 — State of Oregon, Plaintiff-Respondent vs. John Byron Wolberg, Defendant-Appellant, Circuit Court No. 30160, has been compared by me with the original and that it is a correct transcript therefrom, and of the whole of such original Order as above mentioned as the same appears on file and of record at my office in my care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 25th day of June, 1971.

Alberta M. Bryant, Clerk.
By Helen Gardner, Deputy

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-335

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v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1971

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JOHN BYRON WOLBERG,

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v.

STATE OF OREGON,

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner's statement is accepted.

JURISDICTION

Petitioner's statement is accepted.

QUESTION PRESENTED

Petitioner's statement of the question presented is rejected, because the State of Oregon does not concede that "there are no facilities for treatment of [petitioner's] mental disease" available within the framework

of the Oregon correctional system. Respondent substitutes the following, which, except for the matter in brackets, is verbatim the Federal question presented to the Oregon Court of Appeals in petitioner's brief in that court.

> Is the sentence imposed upon defendant [committing him to the custody of the Oregon Corrections Division for a term not to exceed 10 years] cruel and unusual and not proportionate to the offense [of assault with a dangerous weapon,] in violation of Amendments VIII and XIV of the Constitution of the United States?[1]

STATUTES INVOLVED

In support of its reasons for denying the petition herein, respondent relies upon various sections of Oregon Revised Statutes (hereinafter cited as ORS) which are not set forth by petitioner. Since the constitutionality, construction, or application of these statutes is not in issue, and since they are cited merely to support the argument advanced below, they are not collected here, but are set forth in footnotes on the appropriate pages of this brief.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent supplements petitioner's statement of the case with the following additions, corrections, and exceptions thereto.

---

[1] The "Question Presented" at page 2 of Appellant's Brief in the Oregon Court of Appeals reads, in full, as follows:

"Is the sentence imposed upon defendant cruel and unusual and not proportionate to the offense in violation of Article I, Section 16 of the Constitution of Oregon, and Amendments VIII and XIV of the Constitution of the United States?"

1. Respondent denies that petitioner will necessarily be confined in the Oregon State Penitentiary, which petitioner treats as a foregone conclusion. The place of confinement of persons committed to the custody of the Oregon Corrections Division is a matter to be determined by the Division, as is explained more fully in subheading B of respondent's Reasons for Denyng the Writ, below.

2. Respondent acknowledges that the psychiatrists who examined petitioner were of the opinion that the facilities at the Oregon State Penitentiary would provide inadequate treatment of petitioner's mental problems. Respondent adds, however, that the psychiatrist who stated that hospitalization followed by outpatient care was the proper course of treatment for petitioner also expressed the following opinion at petitioner's sentencing hearing.

> "* * * I think also that the service at the Oregon State Hospital for this purpose, in my opinion, would be adequate." (Tr. Sentencing 36).

3. At the time he imposed sentence herein, the trial judge stated:

> "* * * [T]his is about as serious an assault with a dangerous weapon as anyone here in the courtroom can recall where the victim is able to testify. I think if there is any hospitalization that it will be arranged by the authorities and that the Order of this Court is, that your legal and physical custody e committed to the Corrections Division without limitation of time for a term not to exceed 10 years. I will recommend and point out to the Corrections Division when I make my report that these two psychiatrists have indicated that treatment is, well, they say necessary or beneficial, or at least indicated and they can

arrange it for you and perhaps they will. The reason I said 10 years, I don't expect that you will be there that long and that also will be up to those authorities, but I think had you been here on the charge that you would have been here, had things worked out as you intended that would have been a minimum sentence.[8] That will be the Order." (Tr. Sentencing 45-46).

REASONS FOR DENYING THE WRIT

In his petition for certiorari, petitioner depicts himself as a mentally-ill person condemned under a primitive penal system to 10 years' imprisonment in the penitentiary with no hope of treatment for his mental disorder. Respondent does not deny that petitioner suffers from a mental disorder, just as petitioner does not deny that he is legally sane, and therefore responsible for his criminal conduct, under present Oregon law.[9] However, the petition herein presents a thoroughly misleading picture of Oregon sentencing and commitment procedures, and of what can be done to treat petitioner under them. Accordingly, the purpose of this brief in opposition is to correct any misimpression concerning these matters which the petition may have given, and thereby

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[8] N.B. The trial judge is apparently alluding here to the fact that, had petitioner been convicted of first degree murder, he would not have been eligible for parole until he had served at least 10 years of his sentence. It will be recalled that petitioner was originally indicted for assault with intent to kill, but ultimately pleaded guilty to the charge of assault with a dangerous weapon. See *State v. Wolberg*, 92 Or. Adv. Sh. 621, — Or. App. —, 483 P.2d 104 (1971).

[9] It may be noted in passing that, while Oregon presently follows the "M'Naghten rule" for determining legal insanity, it has adopted and after December 31, 1971, will follow a test of insanity based on the Model Penal Code, whereby "a person is not responsible for his criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." ORS 161.295(1); Oregon Laws 1971, ch. 743, § 36(1).

to demonstrate that the sentence imposed in this case is not cruel and unusual on the grounds urged by petitioner.

A. It is not conceded that the Oregon correctional system is incapable of providing treatment for petitioner's mental disorder.

Respondent categorically denies petitioner's repeated assertion that the State of Oregon has already conceded its inability to provide treatment for petitioner's mental illness. The assertion is apparently based solely on the fact that the Respondent's Brief filed by the State in the Oregon Court of Appeals began with the sentence, "Defendant's statement of the case, the question presented, and the facts are accepted," rather than quibble with petitioner's obviously argumentative framing of the legal issues presented in his brief,[6] a practice frequently followed by respondents in this state when it seems reasonable to assume that the Oregon appellate courts will not mistake argumentation for literal fact.

To "accept" petitioner's argumentative language for purposes of his appeal was, of course, to acknowledge that such language stated his position with respect to the issues presented. But it was not a stipulation in the

[6] The language which gives rise to the so-called "concession" asserted for the first time in this Court appears at page 3 of petitioner's brief in the Oregon Court of Appeals, under the heading "Statement of the Facts," and is as follows:

> "The facilities available to the State for the treatment of [petitioner's] condition are insufficient to provide him with the type of intensive care and treatment he requires (Tr 26); under the legal and physical custody of the Corrections Division, he will be reduced to medications and to subservience and there will be no treatment for his condition (Tr 37). That this is so is uncontested fact supported by the record and based upon the experience and personal observation of the expert witnesses called on behalf of defendant at his sentencing (Tr 24-29)."

courts of Oregon, nor is it a concession in this Court, that the Oregon correctional system is, in fact, incapable of providing treatment for petitioner's mental disorder. Indeed, petitioner did not attempt to argue in the state court that the State had thus stipulated to the inadequacy of its correctional system. Had he done so, he would have had the speciousness of such a contention pointed out before now, and very possibly the court itself would have saved respondent the trouble of doing so.

B. Petitioner was not necessarily sentenced either to 10 years' imprisonment or to confinement in the Oregon State Penitentiary. Rather, he is committed to the custody of the Oregon Corrections Division for an indefinite term.

Contrary to petitioner's assertions, his sentence is not necessarily one of 10 years' duration. Under Oregon law, all felony sentences are for an indeterminate period of time, with the trial court having power only to fix the maximum potential length thereof. ORS 137.120(2).[4] Nor does petitioner's sentence necessarily involve confinement in the Oregon State Penitentiary, because an Oregon trial court has no power to designate the institution in which a criminal defendant is to be confined. The court merely commits the defendant to the custody

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[4] ORS 137.120(2).

"Whenever any person is convicted of a felony, the court shall, unless it imposes other than a sentence to serve a term in the penitentiary, sentence such person to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in the judgment and sentence a maximum penitentiary term for the crime, which shall not exceed the maximum term of imprisonment provided by law therefor; and judgment shall be given accordingly. Such a sentence shall be known as an indeterminate sentence."

of the Oregon Corrections Division, which thereafter administratively determines what is to be done with the person convicted. ORS 137.124.[6]

C. The Oregon Corrections Division has the authority to commit petitioner to the Oregon State Hospital, where there are adequate facilities to treat petiioner; and the sentencing court undertook to recommend that petitioner be considered for such commitment.

The State of Oregon maintains a number of hospitals for the mentally ill, which are administered by the Oregon Mental Health Division. Among these is the Oregon State Hospital at Salem. ORS 426.010.[7] This facility is

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[6] ORS 137.124

"(1) If the court imposes a sentence of imprisonment upon conviction of a felony, it shall not designate the penal or correctional institution in which the defendant is to be confined but shall commit the defendant to the legal and physical custody of the Corrections Division.

"(2) Upon commitment to the Corrections Division all convicted male persons under the age of 26 who have not been convicted of the crime of murder or rape where actual force is involved or treason, or who have not served a previous term of imprisonment in an adult penal institution, shall be assigned initially to the Oregon State Correctional Institution. All other convicted male felons shall be assigned initially to the Oregon State Penitentiary.

"(3) After assuming custody of the convicted male person and notwithstanding the initial assignment pursuant to subsection (2) of this section, the Corrections Division may transfer inmates from one penal or correctional institution to another such institution for the purpose of diagnosis and study, rehabilitation and treatment, as best seems to fit the needs of the inmate and for the protection and welfare of the community and the inmate."

[7] ORS 426.010

"Except as otherwise ordered by the Mental Health Division pursuant to ORS 179.325, the Oregon State Hospital in Salem, Marion County, the F. H. Dammasch State Hospital authorized to be located within a 20-mile radius of the county courthouse of Multnomah County, and the Eastern Oregon Hospital and Training Center in Pendleton, Umatilla County, shall be used as state hospitals for the care and treatment of mentally ill persons who are assigned to the care of such institutions by the Mental Health Division or who have previously been committed to such institutions."

adequate for the treatment of petitioner's mental condition, in the opinion of the psychiatrist who recommended hospitalization at petitioner's sentencing (Supp. Statement, ¶ 2, at 3 above). The Oregon Corrections Division is empowered to transfer persons in its custody, with the consent of the Mental Health Division, to the Oregon State Hospital, "whenever the welfare of the person transferred and the efficient administration of the institutions require the transfer." ORS 179.010(2), 179.473(1)(a).[6] In apparent recognition of the fact that such transfer can be arranged, the trial judge undertook, at the time he sentenced petitioner, to point out to the Corrections Division that psychiatric treatment was indicated in petitioner's case (Supp. Statement, ¶ 3, at 3-4 above).

Under these circumstances, the sentence imposed in this case does not constitute cruel and unusual punishment. Petitioner's recourse in this case is not to burden this Court with unmeritorious constitutional questions,

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[6] ORS 179.010 "As used in this chapter, unless the context requires otherwise: • • •

"(2) 'Division' means the division designated by law to operate, control, maintain and supervise any institution, and includes the Mental Health Division, the Corrections Division and the Special Schools Division."

ORS 179.473

"(1) Notwithstanding any other provision of law, whenever the welfare of the person transferred and the efficient administration of the institutions require the transfer, subject to ORS 179.476:

"(a) Any division, with the consent of the Mental Health Division, may make a permanent or nonpermanent transfer of a person at any institution under its jurisdiction to an institution for the mentally ill or mentally deficient, or, with the consent of the school, to the University of Oregon Medical School, or with the consent of the Corrections Division, from an institution for the mentally ill or mentally deficient to a juvenile training school."

premised upon a distorted portrait of the Oregon correctional system. It is, rather, to petition the Oregon Corrections Division to take the administrative action necessary to cause petitioner to be committed to the appropriate mental facility, and, if the circumstances indeed warrant such action now or in the future, to apply to the State Board of Parole and Probation for parole and ultimate discharge therefrom, pursuant to ORS 144.050 and 144.310.®

® ORS 144.050

"Subject to applicable laws, the State Board of Parole and Probation may authorize any inmate, who is confined in any county jail for a period of six months or more or committed to the legal and physical custody of the Corrections Division, to go upon parole subject to being arrested and detained as provided in ORS 144.350. The state board may establish rules and regulations applicable to parole."

ORS 144.310

"When any paroled prisoner has performed the obligations of his parole for such time as satisfies the State Board of Parole and Probation that his final release is not incompatible with his welfare and that of society, the board may make a final order of discharge and issue to the paroled prisoner a certificate of discharge; but no such order of discharge shall be made in the case of a person convicted of murder in the first degree and in no other case within a period of less than one year after the date of release on parole except that when the period of the sentence imposed by the court expires at an earlier date, a final order of discharge shall be made and a certificate of discharge issued to the paroled prisoner not later than the date of expiration of the sentence."

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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